Chase Perdana Bhd v Md Afendi bin Hamdan

HIGH COURT (KOTA KINABALU) — SUIT NO K22–126 OF 1998
LINTON ALBERT J
1 MARCH 2006

Civil Procedure — Stay of proceedings — Application for — Pending appeal — Principles in which court should look out for — Function of the court — Substance of a case — Whether 'special circumstances' if the stay is not granted, the appeal, if successful will be rendered nugatory, or that the applicant, if successful in the appeal, cannot be restored to its former position — No evidence that the respondent is not in a financial position to repay the applicant — Whether the court is to determine the balance of convenience akin to the exercise required on an application for injunction — Whether court should exercise its discretion in granting a stay

The plaintiff agreed to pay RM5m to the defendant to purchase the defendant's shares in a company which had an interest in another company holding a stockbrocking licence given by the relevant authority. The stockbrocking company never took off but the plaintiff had already paid a deposit and part payment of RM1m to the defendant and the defendant had on his part transferred all of his shares to the plaintiff. In 1998, the plaintiff commenced proceedings against the defendant to recover the RM1m from the defendant who not only resisted the claim but made a counterclaim for the balance of the purchase price of the shares. After a full-blown trial, the plaintiff was held liable for the balance of the purchase of RM4m to the defendant. The plaintiff had since appealed to the Court of Appeal against the decision and now applyied for a stay of execution pending the disposal of its appeal on the ground that if the plaintiff pay the judgment sum to the defendant, it would not be able to recoup the same from the defendant in the event the plaintiff's said appeal is successful especially when RM4,000,000 plus interest is a huge sum of money and there is a possibility that the defendant may abscond with the said money and thus render any decision of the said appeal, nugatory. It had also been argued on behalf of the plaintiff that it is essential for the court to determine the balance of convenience akin to the exercise required on an application for injunction and therefore the status quo ought to be maintained because the damage to the plaintiff if stay is not granted would be irreparable as opposed to a mere deferment for the defendant if stay is granted.

Held, dismissing plaintiff's application with costs:

(1) Apart from the mere speculation relating to the absolute certainty that the RM4m if paid to the defendant would disappear, there is nothing whatsoever in the affidavit to show that the defendant is insolvent or is predisposed to

dissipate his assets so as to be unable to refund to the plaintiff the RM4m counterclaimed and the RM1m paid as deposit if the plaintiff wholly succeeds in its appeal (see para 3).

(2) The matters set out in the plaintiff's affidavit in support do not disclose special circumstances which warrant the exercise of court's discretion to grant a stay of execution (see para 6).

(3) In effect, what the plaintiff is saying is that there is some justification for asking for more time to pay. This does not constitute special circumstances (see para 8).

(4) Proposition that the court to determine the balance of convenience akin to the exercise required on an application for injunction and therefore the status quo ought to be maintained advanced on behalf of the plaintiff is not applicable to all cases because each case must be considered and determined in accordance with its own peculiar set of facts and circumstances and at the end of the day, an applicant must show that there are special circumstances which warrant a stay of execution (see para 9).

[Bahasa Malaysia summary

Plaintif telah bersetuju untuk membayar RM5j kepada defendan untuk membeli saham-saham defendan dalam syarikat yang mempunyai kepentingan dalam syarikat lain yang memegang lesen broker saham yang telah diberikan oleh pihak berkuasa relevan. Syarikat broker saham itu tidak berjaya tetapi plaintif telahpun membayar deposit dan sebahagian daripada bayaran RM1j kepada defendan dan defendan di pihaknya telah memindahkan kesemua sahamnya kepada plaintif. Pada 1998, plaintif telah memulakan prosiding terhadap defendan untuk mendapat balik RM1j daripada defendan yang bukan hanya menolak tuntutan itu tetapi membuat tuntutan balas untuk baki harga belian saham-saham tersebut. Selepas perbicaraan, plaintif telah dipertanggungjawabkan untuk baki belian RM4j kepada defendan. Plaintif telahpun merayu ke Mahkamah Rayuan terhadap keputusan itu dan sekarang memohon satu penggantungan pelaksanaan sementara menunggu rayuannya selesai atas alasan bahawa jika plaintif membayar jumlah penghakiman kepada defendan, ia tidak akan mendapatnya balik daripada defendan sekiranya rayuan plaintif berjaya terutamanya RM4j berserta faedah itu merupakan sejumlah wang yang besar dan terdapat kemungkinan defendan akan melarikan wang tersebut dan oleh itu mengakibatkan apa-apa keputusan rayuan tersebut, tidak berguna. Ia juga dihujahkan di pihak plaintif bahawa adalah penting untuk mahkamah menentukan imbangan kesesuaian sama terhadap cara yang dikehendaki berhubung satu permohonan untuk injunksi dan oleh itu status quo itu tidak sepatutnya dikekalkan kerana kerugian terhadap plaintif jika penggantungan itu tidak dibenarkan tidak boleh dipulihkan dan bukan seperti satu penangguhan semata-mata untuk defendan jika penggantungan itu dibenarkan.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Selain daripada spekulasi semata-mata berkaitan kepastian sepenuhnya yang

RM4j itu jika dibyar kepada defendan akan lesap, tiada apa-apa dalam afidavit yang menunjukkan bahawa defendan adalah tidak solven atau dipengaruhi untuk melenyapkan aset-asetnya agar tidak boleh membayar balik plaintif RM4j yang dituntut balas dan RM1j dibayar sebagai deposit jika plaintif berjaya dalam rayuannya (lihat perenggan 3).

(2) Perkara-perkara yang terdapat dalam afidavit sokongan plaintif tidak menunjukkan keadaan istimewa yang mewajarkan penggunaan budi bicara mahkamah untuk membenarkan satu penggantungan pelaksanaan (lihat perenggan 6).

(3) Oleh demikian, apa yang plaintif katakan adalah terdapat beberapa justifikasi untuk memohon lebih masa untuk membuat pembayaran. Ia tidak membentuk keadaan istimewa (lihat perenggan 8).

(4) Cadangan agar mahkamah menentukan imbangan kesesuaian sama terhadap cara yang dikehendaki berhubung satu permohonan untuk injunksi dan oleh itu status quo itu tidak sepatutnya dikekalkan yang dikemukakan bagi pihak plaintif tidak boleh digunakan kepada semua kes kerana setiap kes hendaklah dipertimbangkan dan ditentukan menurut fakta-fakta dan keadaan khususnya dan akhirnya, pemohon hendaklah menunjukkan bahawa terdapat keadaan istimewa yang mewajarkan penggantungan pelaksanaan tersebut (lihat perenggan 9).]

Notes

For cases on application for stay of proceedings, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject index paras 5771–5794.

Cases referred to

John Lo Thau Fah v FACB Resorts Berhad [2004] MLJ 46 (distd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 at p 269 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)
Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd [2005] 6 MLJ 555 (folld)

Christopher Chong (Lind Willie Wong & Chin) for the plaintiff.
Jeyan Marimuttu (J Marimuttu & Partners) for the defendant.

Linton Albert J:

[1] The plaintiff agreed to pay RM5m to the defendant to purchase the defendant's shares in a company which had an interest in another company holding a stockbrocking licence given by the relevant authority. This was just before the share market boom turned to bust in the 1990s. The stockbrocking company never took off but the plaintiff had already paid a deposit and part payment of RM 1 million to the defendant and the defendant had on his part transferred all of his shares to the plaintiff. In 1998, the plaintiff commenced proceedings against the defendant to recover the RM1m from the defendant who not only resisted the claim but made a counterclaim for the balance of the purchase price of the shares. After a full-blown trial featuring witnesses in high places, the plaintiff was held liable for the balance of

the purchase of RM4m to the defendant. The plaintiff has since appealed to the Court of Appeal against the decision and is now applying for a stay of execution pending the disposal of its appeal.

[2] The plaintiff's application is supported by the affidavit of its executive chairman, Tan Sri Datuk Dr Mohan Swami containing 23 paragraphs in all. Paragraphs 1–6 contain introductory matters which are not relevant for the determination of this application. Paragraphs 7 and 18 reduce into a nutshell the special circumstances relied on by the plaintiff to support its application. The rest of the affidavit in support, insofar as they are relevant, admirably expound the attributes of the plaintiff as a corporate titan. It is apt perhaps, not only for the sake of completeness but more importantly, because the plaintiff's application hinges on them that paragraph 7 and 18 are reproduced verbatim: Paragraph 7:

> I aver that an Order for stay of execution is necessary at this stage before any execution proceedings is taken out by the defendant to enforce the said Judgment against the plaintiff because if the Judgment was executed, it would cause irreparable damage to the reputation, stature as well as cause possible financial implications to the plaintiff company which cannot be compensated by costs.

Paragraph 8:

> Further, I verily believe that should the plaintiff pay the judgment sum to the defendant, it will not be able to recoup the same from the defendant in the event the plaintiff's said appeal is successful especially when RM4,000,000 plus interest (from the date of judgment to the date of full settlement) is a huge sum of money and there is a possibility that the defendant may abscond with the said money and thus render any decision of the said appeal, nugatory. Furthermore, there is no guarantee that the defendant would not have transferred all the money to someone else in the event that the Court of Appeal finds for the plaintiff. This would frustrate the decision of the appeal. Having set out the salient features of the plaintiff's affidavit in support it will be useful to begin by referring to a passage in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 at p 269:

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). Where It is alleged that there is a danger of die unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the. insolvency of the other party, this must be shown in the affidavit...

[3] The above quoted passage would put paid to the bare assertion that the plaintiffs appeal if successful may well be rendered nugatory if stay is not ordered. Apart from the mere speculation relating to the absolute certainty that the RM4m if paid to the defendant would disappear, there is nothing whatsoever in the affidavit to show that the defendant is insolvent or is predisposed to dissipate his assets so as to be unable to refund to the plaintiff the RM4m counterclaimed and the RM1m paid as deposit if the plaintiff wholly succeeds in its appeal. The plaintiff's contention under para 7 would likewise be totally demolished by reference to *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 where under similar circumstances the Court of Appeal made the following remarks at p 70:

> The grounds relied on by the appellant are nothing more than 'fear of losin'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

[4] The principles to be applied in an application for stay of execution have been laid down in *Ming Ann* and *Kosma* which are not only cases of high authority but standard authorities consistently applied in applications for stay. The principles have been encapsulated in the recent case of *Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd* [2005] 6 MLJ 555 and I can do no better than to reproduce the relevant passage (per Abdul Malik Ishak J at p 561):

> The court has an absolute and unfettered discretion as to granting or refusing a stay and it will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on an affidavit. The justice of the case on stay is usually arrived at by striking a judicious and equitable balance between the principle that the successful party in the litigation ought be allowed to reap the fruits of his litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. Yet, it must be borne in mind that a successful party in litigation has acquired a vested interest in the outcome of the case whereas the other party who appeals only has an interest contingent upon a successful outcome of his appeal. And, it is primarily for this reason and the implied caveat that the courts should discourage parties who lose their cases upon merits, from wrenching the fruits of litigation from the successful parties - by keeping the litigation alive through spurious appeals without any real prospect of success and simply in the hope of gaining some respite against immediate execution upon the judgment, that the courts have been and are only moved to grant such a stay upon a set of certain requirements which, for want of a more appropriate term, the courts have been driven to use, quite rightly, the oft-quoted expression 'special circumstances'.

[5] It is futile for the plaintiff to lament the bad publicity it has brought upon itself by taking the defendant to court and the prospect of irreparable damage to its reputation while at the same time flaunting its financial strength and well-being, the array of ongoing mega projects, it is presently undertaking, including those it is entrusted with by the Government, no less, and a host of equally impressive projects it is actively pursuing,. Indeed, the plaintiff's press release issued in the face of publicity engendered by the trial and the subsequent judgment reeks of arrogance, suggesting, with its own reasoning, that its appeal to the Court of Appeal is all but won. So certain is the plaintiff, it seems, of the outcome of its appeal that the press release contains this statement:

> The Company is of the opinion that its grounds for appeal as stated below have substantive merit to warrant our belief that there would not be any material financial impact on the Group.

[6] The matters set out in the affidavit in support clearly show that there is justification for not exercising the discretion in favour of the plaintiff. All that the plaintiff has to do to avert the perceived ill-effects of execution is to put its money where its mouth is — pay the judgment sum, after all, no execution proceedings has

been commenced and there is nothing to suggest that the defendant would not be able to refund the money paid to him when the Court of Appeal decides in its favour and even beyond, if may add, because it has been indubitably established that the defendant has been and is still engaged in business, with assets worth several million ringgit and who is to say that the money paid to him if invested, would not multiply in a couple of years. It is certainly preposterous to suggest, in the absence of evidence, that the defendant would 'transfer the money somewhere else' as stated in the affidavit in support, whatever that means. In any event, I am satisfied that the matters set out in the plaintiff's affidavit in support do not disclose special circumstances which warrant the exercise of court's discretion to grant a stay of execution. The various consequences alluded to, real or imagined, are common occurrences in the aftermath of a well-publicised trial. There is nothing unusual about the adverse effects that would befall the plaintiff, faced with execution proceedings, as the same would invariably happen to any other company, person or entity similarly circumstanced.

[7] In a dramatic about-face, the plaintiff in its affidavit in reply discloses for the first time that it has since 2003 been under a scheme of arrangement with its creditors whereby its many creditors have agreed to desist from taking legal action against the plaintiff and that it is not completely free to utilize the considerable amount of monies flaunted in the affidavit in support because these are monitored by an accountant specifically tasked to protect its creditors. The penultimate paragraph summarises the plaintiff's predicament thus:

> Although the plaintiff has the means to eventually pay the defendant RM4m if the appeal proper is dismissed, this payment if made at this moment would put a strain on the plaintiff's company to the extent that it would not be able to meet the said payment and execution proceedings would be levied against It causing all scheme creditors to panic and also to execute against the plaintiff.

[8] Learned counsel for the plaintiff devoted a substantial part of his written submissions to show that the plaintiff is a veritable wounded giant, not the corporate titan flaunted in the affidavit in support. This practice of relying on matters set out in affidavits subsequent to an affidavit in support and augmenting one's case on matters not set out in the affidavit in support coupled with submissions on matters not therein set out has been consistently deprecated in our courts, nevertheless, for what they are worth, I still do not think the matters set out in the affidavit in reply are of any consequence. Any borrower from a financial institution, for a housing loan for instance, can attest to the plethora of events that would trigger instant recall of the whole loan and execution proceedings is but one of those events. Hence, there is nothing out of the ordinary about the plaintiff's creditors taking execution proceedings, in the circumstances described by the plaintiff. In effect, what the plaintiff is saying is that there is some justification for asking for more time to pay. That, in my view does not constitute special circumstances (see *Ming Ann*). I do not think that the authorities cited by learned counsel is of assistance to the plaintiff, in particular, *John Lo Thau Fah v FACB Resorts Berhad* [2004] MLJ 46 because there, the restructuring scheme proposed by the applicant would be in serious jeopardy and the dire consequences real whereas here, the scheme of arrangement has been in place for several years and the consequences if stay is not granted, merely speculative.

[9] It has also been argued on behalf of the plaintiff that it is essential for the court to determine the balance of convenience akin to the exercise required on an application for injunction and therefore the status quo ought to be maintained because the damage to the plaintiff if stay is not granted would be irreparable as opposed to a mere deferment for the defendant if stay is granted. No doubt, the cases cited by learned counsel make references to the balance of convenience but no such requirement is laid down in either *Ming Ann* and *Kosma*. With respect, I do not think the proposition advanced on behalf of the plaintiff is applicable to all cases because each case must be considered and determined in accordance with its own peculiar set of facts and circumstances and at the end of the day, an applicant must show that there are special circumstances which warrant a stay of execution. Here, as I have tried to explain, the plaintiff has failed to do so. There is no reason whatsoever to defer the defendant's enjoyment of the fruits of his success bearing in mind that it was the plaintiff who had dragged the defendant to court in the first place. I must commend learned counsel for the defendant, Mr Jeyan Marimuttu for his profound sense of fairness and justice in giving a firm assurance that the defendant would not execute the judgment until the disposal of the application, thus sparing the plaintiff any unnecessary embarrassment Perhaps the plaintiff may wish to consider making the payment to the defendant without further ado thereby restoring its illustrious reputation.

[10] For the reasons and in the circumstances aforesaid, the plaintiff's application is dismissed with costs.

Paintiff's application dismissed with costs.

Reported by K Krishnan